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In the Supreme Court of the United States

OCTOBER TERM, 1958

CUSTOM BUILT HOMES CO., INC., *Petitioner,*

vs.

KANSAS STATE COMMISSION OF REVENUE AND TAXATION, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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27-9404

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In the Supreme Court of the United States

OCTOBER TERM, 1958

CUSTOM BUILT HOMES CO., INC., *Petitioner,*

vs.

KANSAS STATE COMMISSION OF REVENUE AND TAXATION, *Respondent.*

No. 980

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW.

The trial court, District Court of Johnson County, Kansas, wrote no opinion. Its findings of fact and conclusions of law are not reported but appear at pages 21-25 in the abstract filed with the Supreme Court of Kansas. The opinion of the Supreme Court of Kansas affirming the judgment of the District Court of Johnson County, Kansas, is reported in 184 Kan. 31, 334 P. 2d 808 (1959) (pet. app. A-8-28).

JURISDICTION

The opinion of the Supreme Court of Kansas affirming the judgment of the trial court was filed January 24, 1959. The petitioner, Custom Built Homes Co., Inc., filed a motion for rehearing which was denied by the Supreme Court of Kansas on March 11, 1959. The petition for a writ of certiorari was filed with this court on June 6, 1959. The jurisdiction of this court is invoked under 28 USC, section 12, 1957 (3).

QUESTION PRESENTED

Whether the state of Kansas is prohibited by the commerce clause of the United States Constitution from collecting compensating (use) tax upon the use of tangible personal property by the petitioner who, as contractor, accepted delivery and affixed prefabricated sections of houses to real estate located in the state of Kansas?

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the commerce clause, article 1, section 8, clause 3, Constitution of the United States:

> "Congress shall have the power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

STATUTES INVOLVED

G. S. Kan., 1949:

"79-3602 (*m*) . . . For purposes of this act, sales of tangible personal property to all contractors, subcontractors or repairmen of materials and supplies for use by them in erecting structures for others, or building on, or otherwise improving, altering, or repairing real property of others are sales for final consumption.

"79-3702 (*b*) The meaning ascribed to words and phrases in section 79-3602 of the General Statutes Supplement of 1943, insofar as is practicable, shall be applicable herein unless otherwise provided. The provisions of sections 79-3601 to 79-3625 of the General Statutes Supplement of 1943 and amendments thereto, both sections inclusive, relating to enforcement, collection and administration, insofar as practicable, shall have full force and effect with respect to taxes imposed under the provisions of this act.

"(*c*) The word 'use' means and includes the exercise within this state by any person of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include processing, or the sale of the property in the regular course of business, and except storage as hereinafter defined.

"79-3703. *Tax or excise imposed; rate.* There is hereby levied and there shall be collected from every person in this state a tax or excise for the privilege of using, storing, or consuming within this state any article of tangible personal property purchased subsequent to June 30, 1945. Such tax shall be levied and collected in an amount equal to the purchase price paid by the taxpayer multiplied by

the rate of two percent. All transactions involving compensating tax or use tax prior to July 1, 1945, shall be administered under the law as it exists prior to that date.

"79-3703a. *Evidence that property was sold for use in state.* For the purpose of the proper administration of this act and to prevent evasion of the tax, evidence that tangible personal property was sold by any person for delivery in this state shall be prima facie evidence that such tangible personal property was sold for use in this state.

"79-3704. *Exemptions.* The provisions of the act shall not apply: . . . '(*d*) In respect to the use, storage or consumption of any article of tangible personal property brought into or used within the state of Kansas if such article of tangible personal property would not have been subject to tax under the provisions of the retailers' sales tax act of this state if purchased within this state:'

"79-3705a. *Tax paid by consumer or user; duty of retailers; returns.* The tax levied hereunder shall be paid by the consumer or user to the retailer and it shall be the duty of each and every retailer to collect from the consumer or user, the full amount of the tax imposed by this act, and such tax shall be a debt from the consumer or user to the retailer when so added to the original purchase price, and shall be recoverable at law in the same manner as other debts: *Provided, however,* If the tax levied under section 2 (79-3703) of this act is not collected or collectible by the retailer, then the person using, consuming or storing tangible personal property in this state shall file a return and pay the tax, as required by section 10 (79-3706) of this act."

Regulations Involved

"94-7-1. . . . *Purpose of the act.* The compensating (use) tax act, as amended, supplements the Kansas retailers' sales tax act by imposing a like tax for the privilege of using, storing or consuming within this state tangible personal property purchased at retail, and in respect to which property neither a sales tax nor a use tax of two percent or more has been imposed by this state or any other state.

"94-7-4. . . . *The taxable event.* The tax is imposed upon the privilege of using, storing, or consuming within this state any article of tangible personal property purchased subsequent to June 30, 1945. When such property is used, stored, or consumed in Kansas, such use, storage, or consumption in Kansas is the taxable event.

"94-7-7 (*b*). . . . . Delivery is held to have taken place in this state (1) when physical possession of tangible personal property is actually transferred to the buyer within this state. . . .

"94-7-11. *Purchases other than at retail.* The test of a retail purchase is the purpose for which the purchase is made. Purchases for final use, storage, or consumption are retail purchases as distinguished from purchases for resale. The status of the seller is not a controlling factor; purchases at retail may be made from . . . . manufacturers, ... the important consideration is whether the purchase is made for final use, storage or consumption."

STATEMENT

In this suit for Kansas use taxes, the pertinent facts may be summarized as follows:

Custom Built Homes Co., Inc., hereafter called petitioner, is a Kansas corporation having its principal place of business in Johnson County, Kansas. During the period in question from October 1, 1951, to September 30, 1955, the petitioner was engaged in the business of home development and sale of prefabricated homes in Stony Point Heights Addition, Wyandotte County, Kansas.

Petitioner entered into a contract to purchase prefabricated houses from Page and Hill Homes, Inc., a Minnesota corporation, hereafter called Page-Hill. Under the contract, Page-Hill was to furnish and deliver f. o. b. building site at Wyandotte County, Kansas, 190 prefabricated units at the prices and under the terms and conditions specified.

Under the terms of the contract Page-Hill delivered from its factory in Minnesota the prefabricated sections to the building site. Delivery was made by Page-Hill trucks operated by Page-Hill drivers. Wall and partition sections including exterior trim, siding, building paper, studs, etc., were attached. The interior partitions were also completed and prefabricated in the same manner. The ceiling sections were completed and prefabricated with the trim

already in place. Likewise the roof sections were prefabricated containing joists and insulation. There were certain loose items such as trim, shingles, etc., which were separate from the prefabricated sections. (All the above has been stipulated by the parties herein. Abstract pages 12-13.)*

In the development of Stony Point Heights Addition, petitioner purchased the lots, erected such foundations as were necessary and constructed thereon a platform constituting floor joists and subflooring from raw materials purchased from Kansas retailers and upon which Kansas sales tax was paid. The completed house disassembled came with the truck excluding deck material, oak floors, furnace and wiring.

Petitioner employed five carpenters and two laborers. (C. Ab. pp. 3 and 4.) When the Page-Hill truck arrived at the Stony Point Heights Addition, Wyandotte County, Kansas, the driver was directed by an employee of the petitioner to a specific house foundation—the building site. The truck usually parked in the street immediately in front of the foundation. The truck would then unload in the following manner: The Page-Hill driver unhooked from

* The record printed for the use of the Kansas Supreme Court consists of two volumes: The Abstract (Ab.) consisting of portions of the trial record designated and printed by Custom Built Homes Co., Inc., and the Counter Abstract (C. Ab.) constituting the remainder of the trial record designated and printed by the State Commission of Revenue and Taxation.

the semitrailer and installed a boom on said tractor. He would unbutton the canvas covering, sometimes with the assistance of the petitioner's employees then back the tractor to the semitrailer and hook onto a section of the panel which would be approximately twenty-four feet long. The petitioner's employees would hook the cable to the panel and the truck driver, remaining in the cab, would raise said panel from the semitrailer. Petitioner's employees would steady the panels hanging from the boom on the tractor and the driver would back the tractor into the proper position on the foundation. The panel then would be guided in place by the laborers of the petitioner. Petitioner's carpenters would temporarily attach the panel to the foundation by applying from one to three nails. One of the carpenters would then climb up the panel and release the hook of the crane. The carpenters would then steady the panel until the next section was installed and the two affixed together. During this whole operation the truck driver would not leave the cab (C. Ab. pp. 7, 8). This process was used for all sections including exterior and interior except the roof and ceiling sections which were unloaded by petitioner's employees, placed in the petitioner's truck and manually installed by petitioner's employees. (C. Ab. pp. 10, 11.) All labor and carpenter work was done by petitioner's employees while the house was under

construction except such work as was done by subcontractors of the petitioner. The Page-Hill driver drove the tractor and remained in the cab where he operated the power take-off which operated the crane. (C. Ab. p. 12.)

The State Commission of Revenue and Taxation sustained an assessment of compensating (use) tax in the amount of $22,133.57 plus interest of $1,257.33 for a total sum of $23,390.90 against Custom Built Homes on account of said use of out-of-state purchases (pet. app. A 1-3). Petitioner appealed to the District Court of Johnson County, Kansas. After a trial of which oral and documentary evidence was presented, the court entered findings of fact and conclusions of law in favor of the State Commission of Revenue and Taxation (pet. app. A 4-7). The District Court found that the taxpayer did use, store and consume tangible personal property within the state of Kansas and that said use was subject to Kansas compensating (use) tax.

On appeal, the Supreme Court of Kansas summarized the facts (pet. app. A 8-13), supporting the trial court's findings that the title to tangible personal property passed to the petitioner within the state of Kansas and that the same was subject to the Kansas compensating (use) tax. Said court further found that the journey of interstate commerce had ceased and that article 1, section 8, clause 3 of the U. S. Constitution commonly referred to as the commerce

clause did not prevent the state from taxing the use of this tangible personal property within this state. (Pet. app. A 26-28.) Accordingly, it affirmed the judgment of the trial court. (Pet. app. A 28.)

ARGUMENT

The respondent, State Commission of Revenue and Taxation, is cognizant of the body of cases which provide that a state may not tax personal property while in transit in interstate commerce. *Coe v. Errol*, 116 U. S. 517 (1886); *J. D. Adams Manufacturing Co. v. Storen*, 304 U. S. 307 (1938). By the same token, there is a great wealth of cases of this court which substantiate the position that once the interstate journey has ceased the state or local authorities may properly impose a tax upon tangible personal property used, stored or consumed within the state. *Henneford v. Silas Mason Co.*, 300 U. S. 577, 81 L. ed. 814 (1937); *Southern Pacific Co. v. Gallagher*, 306 U. S. 167, 83 L. ed. 586 (1939); *McGoldrick v. Berwind-White*, 309 U. S. 33, 84 L. ed. 565.

It is the contention of the respondent that the interstate journey of these prefabricated sections had ceased within the state of Kansas and that the state could properly impose a tax upon the use of such property. Both the trial court, which had all of the facts before it, and the Supreme Court of Kansas who, on appeal had the facts abstracted for it,

found that the interstate journey had ceased and that the use was taxable in Kansas. The facts show that the petitioner directed the Page-Hill driver to the building site, that the employees of the petitioner hooked the crane to the panels, guided the same to their position on the foundation, affixed the panel to the foundation and released the cable attached to the Page-Hill truck. The Supreme Court of Kansas recognized this and stated:

> "We have no hesitance in declaring that at some point after the interstate journey of the merchandise in question had come to an end, it occupied the status of tangible personal property and as such was used, stored or consumed by the appellant within the contemplation of the Kansas Compensating Tax Act prior to its becoming affixed as real property. The fact cannot be overcome that appellant's employees performed all the labor in constructing the house except for subcontractors working under the appellant. A contrary conclusion would be equivalent to holding that Page-Hill constructed the house, and this would be inconsistent with the evidence before the court." (184 Kan. 44-45.)

If a theory, such as the petitioner contends for, is adopted by this court, the state could be prevented from collecting tax on any building materials purchased outside its borders. It is apparent that if the contention of the petitioner is sustained, the vendor, by holding his hand on his ware until such time as his vendee affixed it to realty, could keep the

same in interstate commerce and defeat the state tax entirely.

Petitioner claims that the unloading is practically a part of the interstate journey and cites as authority a number of cases of this court in an attempt to substantiate its position. On examining the facts of these cases, one immediately discovers the unloading was done by the employees of the carrier. In the case at bar, the petitioner's employees were the moving parties in unloading the prefabricated sections. As a matter of fact, Page-Hill furnished only one employee, *i. e.*, the truck driver.

In addition to the above, the Supreme Court of Kansas properly found that the parties, *i. e.*, Page-Hill, and the petitioner, intended title to pass at the building site in Wyandotte County, Kansas. The contractional provision for delivery was "f. o. b. building site, Wyandotte County, Kansas." Under the law of the state of Kansas as evidenced by the opinion of the Supreme Court of Kansas, this operated to pass title to Custom Built Homes Co., Inc., at the building site in Wyandotte County, Kansas. The petitioner on page 10 of his petition infers that it is immaterial when title passed as the interstate journey had not ceased. We submit the interstate journey had ceased as the prefabricated sections had reached their Kansas destination, *i. e.*, the building site in Wyandotte County, Kansas. The

petitioner and not Page-Hill affixed these sections to real estate and, therefore, the Kansas tax was properly imposed upon the use of said property.

Contrary to petitioner's contention, the problem in this particular case is not one of great concern to the states or other home manufacturers. Despite the large number of sales of prefabricated homes in the state of Kansas, this is the first and only case in which there has been any question as to the state's right to tax the use of the property.

The fact remains that the petitioner did, under Kansas law, use, store and consume tangible personal property in this state after the same had reached its destination. The Supreme Court of Kansas, the highest court in this state, held that the Kansas compensating (use) tax act applied to the transaction. We submit that said holding is not contrary to the commerce clause of the United States Constitution.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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